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Supreme Court of the United States.

OCTOBER TERM, [redacted] 1970

No. 318

STATE CINEMA OF PITTSFIELD, INC.,
Petitioner, Appellant,
v.
MATTHEW J. RYAN ET AL.,
Respondents, Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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To the Justices of the Supreme Court of the United States:

Petitioner, State Cinema of Pittsfield, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit affirming the decision of the United States District Court for the District of Massachusetts, dismissing petitioner's complaint for temporary and permanent injunction under 28 U.S.C. §§ 1331 and 1443 and 42 U.S.C. § 1983.

Opinions Below.

The Court of Appeals, in a per curiam opinion, affirmed the decision of the United States District Court for the District of Massachusetts. Its decision, not yet reported, is included herein as Appendix A.

The opinion of the District Court dismissing petitioner's complaint is reported in 303 F. Supp. 579, and is included herein as Appendix B.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on March 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). There was no petition for rehearing.

Questions Presented.

1. Whether the threat by a state prosecutor to arrest and prosecute a motion picture exhibitor for exhibiting a film and to seize that film, which has been widely distributed through the United States, prior to an adversary hearing on the obscenity thereof is an unconstitutional prior restraint of freedom of speech guaranteed by the First Amendment to the United States Constitution under *Bantam Books, Inc.*, v. *Sullivan*, 372 U.S. 58 (1963).

2. Whether a motion picture exhibitor who is exhibiting a film, which has been widely exhibited throughout the country, is entitled to have state officials enjoined from threatening to prosecute and to seize the film prior to the holding of an adversary hearing on the constitutional protection of such film.

3. Whether the mere fact that a state prosecutor does not publicly announce his threats to prosecute an exhibitor and seize a film without a prior adversary hearing insulates his actions from constitutional infirmity.

4. When a petitioner seeks initial relief in the Federal Court, and does not seek to enjoin prosecution, but only threats of prosecution, must he be held to the extreme requirements to show "Bad Faith" and "special circumstances" under the doctrine of *Cameron* v. *Johnson*, 390 U.S. 611.

5. Is the intent to circumvent procedural rights sufficient bad faith to warrant injunctive relief from threats of prosecution in a matter involving a motion picture.

Constitutional Provisions and Statutes Involved.

UNITED STATES CONSTITUTION, AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1331 (vol. 7, 1964 ed., p. 5963).

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy ex-

ceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. § 1343 (vol. 7, 1964 ed., pp. 5968-5969).

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right of privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983 (vol. 9, 1964 ed., p. 8021).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case.

This is an action under the Civil Rights Act for injunction and damages for the deprivation of petitioner's rights by respondents, who are, respectively, District Attorney for Berkshire County, Massachusetts, Assistant District Attorney for said County, and an officer of the Massachusetts State Police.

On September 4, 1969, in Pittsfield, Massachusetts, the petitioner, a motion picture exhibitor, exhibited a film entitled "Vixen." On that same date the respondents, acting in their official capacities, ordered the petitioner to cease the exhibition of "Vixen" or face arrest, prosecution, and seizure of the print. Despite demands from the petitioner and its representatives to cease, the respondents continued to so threaten the petitioner. At no time, either prior to or after the threats by the respondents, had there been any judicial hearing of any kind or description as to the legality of the exhibition of the film.

As a result of these threats designed to place the petitioner in fear and to circumvent his rights and, in fact, reasonably fearing arrest and prosecution, the petitioner ceased to exhibit "Vixen." The aforementioned conduct of the respondents has effectively and unlawfully sup-

pressed the exhibition of Vixen and has deprived the petitioner of rights secured to it under the Constitution of the United States of America.

Petitioner brought this suit in the United States District Court for the District of Massachusetts, requesting that respondents be enjoined from ordering petitioner and its agents not to exhibit the film "Vixen" and from threatening arrest, prosecution and seizure of the film for failing to comply with such orders and from suppressing "Vixen" in any manner unauthorized by the Constitution and laws of the United States.

The District Court heard the case, by agreement of counsel, as though it were an application for permanent injunction and as though respondents had filed a motion to dismiss. The Court held that since all threats were made directly to petitioner's agents and no public statements had been made by respondents, petitioner did not have a cause of action, stating that "no inevitable adverse economic effect can be felt by the person threatened before he is prosecuted."

The Court of Appeals affirmed the decision in a per curiam opinion, holding that since no public pronouncements were made, petitioner's rights were not infringed.

Argument.

The misuse of power and the resulting effect of such over-extension upon the free will and speech of a motion picture film exhibitor is the central issue of this case.

The power vested in public officials in areas relating to expression and speech has been rightfully curtailed by our laws, and schemes and efforts to exceed this power and subvert the judicial process have been consistently opposed and struck down by this court. Freedom of thought, ex-

pression and ideas have been accorded the greatest degree of protection, as the would-be suppressor cannot prevail in a society of free speech.

The public official has no authority to secure his individual influence in areas of speech, by threats of reprisal directed at those who do not come around to his views. A system which is based upon threat and coercion, which pits men's desire for free speech against the fear of arrest and loss of property will quickly emasculate the first amendment safeguards and place the "censor" in a position of unwarranted and dangerous power. The law does not allow or contemplate that its freedoms be only accorded to the brave, but carefully protects the rights of everyone should they desire to be heard. Freedom of speech, contrary to the holdings below, does not depend upon stiffness of spine.

Because the respondents acted clandestinely and secretly to deprive the petitioner of its rights, the courts below reason that there are no constitutional issues involved. If anything, the clandestine misuse of power is far more frightening to our constitutional system than a violation which is public and open to view. Our whole governmental concept rebels at the secret use of power for we know that if such misuse is affirmed the day of the midnight knock upon the door may not be far away.

Somehow, through the use of a doctrine creating a "public censor" as opposed to a "private censor" the Court of Appeals and the District Court have distinguished *Bantam Books, Inc.*, v. *Sullivan*, 372 U.S. 58 (1963), from the present facts; and have enumerated and created a dangerous rule of law which gains no support either by direct or oblique reference from *Bantam Books* or any other cases of similar pattern. (*HMH Publishing Co.* v. *Garrett*, 151 F. Supp. 903 (N.D. Ind. 1957); *New Am. Library of World*

Literature, Inc., v. *Allen*, 114 F. Supp. 823 (N.D. Ohio 1953); *American Mercury, infra*, p. 10; *Bantam Books, Inc.*, v. *Melko*, 25 N.J. Super. 292, 96 A. 2d 47 (Ch. 1953), mod., 14 N.J. 524, 103 A. 2d 256 (1954).)

The rule to be extracted from the lower court decision is that a person may be threatened and coerced as long as it is not done publicly and in absolute bad faith. Nowhere in either of these opinions does the court deal with the important substantive fact of the effect of the receipt of a threat of arrest and prosecution upon one trying to exercise the first amendment rights.

The entire opinion of *Bantam Books* relates to the transmission of notice to the distributor and the resulting effect upon him when in receipt of a "Commission Notice." The "public" quality of this Commission was nowhere noted and nowhere claimed by the court to be a factor which influenced its decision. The activities of the Commission upon the distributor, calculated to produce fear of arrest and prosecution for noncompliance with this order was the single controlling factor leading the Supreme Court to declare Commission activities unconstitutional.

The complaint in this case alleges that the action on the part of the respondents was not taken to advise the petitioner of its rights but to suppress the petitioner and its exercise of expression. There was a further allegation that the police continued these threats despite the petitioner's demand to cease. Both lower courts speak in terms which allow authorities to threaten arrest and seizure of the film as long as the threats are privately communicated even though they are in direct disregard of procedural safeguards accorded this particular aspect of the speech. Cases will support the claim that seizure of a film must be done only after a prior adversary hearing upon its fitness. (*Tyrone, Inc.*, v. *Wilkinson*, 410 F. 2d 639,

649 (4th Cir. 1969), cert. denied; *Metzger* v. *Pearcy*, 393 F. 2d 202 (7th Cir. 1968); and *Bethview Amusement Corp.* v. *Cahn*, F. 2d (2d Cir. 1969).)

As in *Bantam Books*, it was the procedure that was declared unconstitutional in that it sought in and of itself to circumvent the law and safeguards required of the authorities dealing with first amendment matters. The Court of Appeals, in addition to affirming the District Court's "public threat theory," further required that there be absolute allegation and proof of bad faith (see A. p. 15n.). If a procedure is faulty under the doctrine of *Bantam Books*, then it amounts to a prior restraint, and we must look to the procedure in order to make that determination and not read into this procedure and into *Bantam Books* an absolute standard of bad faith, such as *Dombrowski* v. *Pfister*, 380 U.S. 479, and *Cameron* v. *Johnson*, 390 U.S. 611.

The intent of the authorities which can be inferred from the alleged facts was to suppress "Vixen" without recourse to proper procedural methods. The scheme itself is suppressive and this is enough. The intent to unlawfully suppress materials and circumvent judicial procedure in this instance, as in *Bantam*, can be inferred from the facts. To obtain relief from actions which constitute a prior restraint does not require proof of misrepresentation on the part of the authorities, or that the materials are absolutely protected (see A. p. 14, 4n.). The important point is that the prosecuting authorities do not want to put their case before the correct tribunal and would rather advocate its function for themselves.

The Court of Appeals simply compounded the error of the District Court by placing an additional hurdle before the petitioner by requiring that it prove absolute bad faith on the part of the respondent. It seems from the court's

opinion, the petifioner must allege that the authorities misrepresented their intent to prosecute and would not proceed to court if the threats failed to halt the exhibition of the film, and that the film or speech be unquestionably protected. Such requirement would so burden the process of injunctive relief as to allow its use to redress a prior restraint only in the rarest of instances. Neither of these tests or this standard of bad faith gains support from *Bantam Books* or other cases where courts have allowed injunctive relief to redress the evils of a system of prior restraints. *HMH Publishing Co. v. Garrett, New Am. Library of World Literature, Inc.*, v. *Allen, Bantam Books, Inc.*, *v. Melko*, all *supra; American Mercury*, below.

The petitioner here did not seek to enjoin prosecution. He did not ask the federal court to half or restrain the Commonwealth from prosecuting the case in the exercise of its legitimate powers. The case of *Cameron* v. *Johnson*, 390 U.S. 611, referred to by the Court of Appeals and requiring "special circumstances," relates to the situation where prosecution is sought to be prevented. The petitioner's complaint is worded in terms of a prior restraint, not in terms of an illegal prosecution under an unconstitutional law. The Court of Appeals has incorrectly applied standards of an entirely different fact pattern to the law of prior restraints. Appellant's brief cites cases upholding the power of the police to prosecute, *American Mercury* v. *Chase*, 13 F. 2d 224 (D.C.D. Mass., 1926), and an appellant never contested the respondent's right to seek judicial relief within the courts. To enjoin a threat which constitutes a prior restraint and to enjoin a state prosecution under a state statute are two entirely different matters and create different problems of substantive law. As one reads the law as announced by the Court of Appeals, two rules appear, both of which will seriously undermine first amendment protections:

1. That the police may threaten arrest and prosecution to one who seeks the exercise of his first amendment rights as long as these threats are not made public.

2. In order to enjoin a prior restraint, one must now allege and prove special circumstances under the *Cameron* v. *Johnson, supra*, doctrine, in addition to the factual existence of the prior restraint.

The Supreme Court in *Bantam Books* (pp. 69-70) very aptly has stated our position:

> "Herein lies the vice of the system. The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice is in striking contrast in that it provides no safeguards whatever against the suppression of non-obscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

The right interfered with here is not only one which inures to the distributor, but a prior restraint also deprives the public of its opportunity to view a film or hear a speech and to judge it as it sees fit.

Since *Bantam Books*, the Supreme Court has returned its opinion in *Stanley* v. *Georgia*, 394 U.S. 557, making private possession of obscene materials not subject to criminal

sanction. Correlative to the right to possess must be an equal right to see and hear what one chooses. (*Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).) And this right is "not confined to any field of human interest." (*Thomas* v. *Collins*, 323 U.S. 516, 531 (1945).) Indeed, this right was specifically recognized in *United States* v. *Roth*, 237 F. 2d 796, 808 (2d Cir. 1956) which was affirmed by this court:

> "Freedom to speak publicly and to publish has, as its inevitable and important correlative, the private rights to hear, to read, and to think and to feel about what one hears and reads. The First Amendment protects those private rights of hearers and readers."

Similarly, this court recognized that right in *Martin* v. *Struthers*, 319 U.S. 141, 143 (1943), stating that the First Amendment embraces the right to distribute literature and "necessarily protects the right to receive it."

Thus, not only are respondents here attempting to interfere with petitioner's right to possess this material, but its right to disseminate this information to the public, which, in turn, has the right to receive it or reject it as it pleases. Indeed, this court has presently before it the case of *Karalexis* v. *Byrne*, No. , in which a three-judge District Court held that the exhibition of any film may not be suppressed so long as it is not pandered within the meaning of *Ginzburg* v. *United States*, 383 U.S. 463 (1966), and so long as the public is made aware of the nature of the film.

Counterpoised to these principles are the actions of respondents herein, who must clandestinely suppress material with which they do not agree, without any judicial superintendence whatsoever. Respondents have appropriated to themselves the right to be accuser, judge and sentencer, wholly outside of the law.

This court must declare absolutely that no actions such as this may be sanctioned. The law relating to prior restraint will be severely regressed if allowed to stand as it is below.

Conclusion.

The petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,
By its attorneys,
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Appendix A.

OPINION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

March 27, 1970.

PER CURIAM. Plaintiff, a motion picture exhibitor, was ordered to cease showing the film "Vixen" by a state assistant district attorney and a state police officer on pain of seizure of the print and arrest of its agents,[1] presumably for violation of the Massachusetts obscenity statute.[2] This action was brought to enjoin the district attorney and state police officer from threatening arrest and prosecution or from seizing or suppressing the film for plaintiff's failure to comply with the order. By agreement of the parties, the district court heard the request for a temporary restraining order as though it were an application for a permanent injunction and as though defendants had moved to dismiss the complaint. The court dismissed the complaint for failure to state a cause of action.[3] For the reasons hereinafter set forth, we affirm.

It is important at the outset to note that plaintiff does not seek to enjoin arrest or prosecution *per se*, that it does not attack the relevant state statute as unconstitutional, that it does not question defendants' good faith in taking the actions complained of,[4] and that it does not seek to assert any claim on behalf of the public interest. This case therefore does not even approach the rigorous require-

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[1] Plaintiff complied with the order, allegedly to avoid prosecution.

[2] Mass. Gen. Laws Ann. ch. 272, § 28A (1959).

[3] *State Cinema of Pittsfield, Inc.* v. *Ryan*, 303 F. Supp. 579 (D. Mass. 1969).

[4] More strictly, perhaps, plaintiff asserts legal bad faith with respect to the procedure itself, but does not claim subjective bad faith, viz., that the defendants do not believe the picture is obscene, or have misrepresented their intent to prosecute.

ments of "special circumstances" discussed in *Cameron v. Johnson*, 390 U.S. 611, 618-19 (1968). The sole basis of this action is plaintiff's contention that the "threat" or "warning" amounted to an unconstitutional prior restraint under the doctrine of *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). We have concluded that that case is inapposite and not controlling.

Bantam Books held unconstitutional the creation and practice of a state commission which passed on the acceptability of literature, publicly denounced as objectionable materials which failed to meet with its approval, and threatened distributors of the materials with prosecution —though the commission had no prosecutorial powers.

At least two critical distinctions are apparent between the scheme in *Bantam Books* and the situation at bar. It is first evident that the commission—through the public nature of its pronouncements—arrogated to itself the role of public censor. The public was told, in effect, what it should and should not read. The injury to both publishers and distributors of the materials was complete when the commission's announcements were made. No judicial action, offensive or defensive, was likely to remedy the damage done to the plaintiff's sales in the event the material was eventually found not to be obscene.[5]

The second important distinction is that the commission's threats of prosecution were addressed to distributors of printed matter rather than to the publishers, which were beyond the reach of state process. Distributors frequently carry large numbers of publications and the effect

[5] It is also important to note that the commission did not limit itself to materials which would be obscene under then-prevailing legal definitions. *Bantam Books*, *supra*, at 64. Plaintiff here concedes that "Vixen" is at least arguably obscene. Therefore, there is no suggestion that the defendants seek to suppress materials which are clearly protected.

on their profits of dropping a small number is usually small. They are therefore unlikely to risk prosecution to test the legality of particular publications.[6] Hence, by focusing on distributors, the commission in *Bantam Books* was able to secure its objectives without the safeguards of the criminal process by intimidation of those whose interest in resisting was minimal. This left the publisher without legal recourse.

Neither of these objections is present here. Since the prosecutor's warning was made in private, the public was not informed that a public official deemed plaintiff's film objectionable. Hence, plaintiff's sale of tickets could not have been affected had it continued to show the film. Moreover, the warning does not work indirectly on plaintiff to suppress the film while avoiding a judicial test of its obscenity. Plaintiff's rights do not depend on the willingness of third parties to risk prosecution. It can do so on its own account.[7]

The record in this case shows no more than a good faith attempt by the police and prosecutor to enforce state law, the validity of which has not been called into question. The essence of plaintiff's complaint seems to be that this was done in an informal manner. In our view this is not actionable, at least absent bad faith. *See Bantam Books, supra*, at 71-72; *cf. O'Toole* v. *Scafati*, 386 F. 2d 169, 170 (1st Cir. 1967).

Affirmed.

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[6] *See American Mercury, Inc.* v. *Chase*, 13 F. 2d 224, 225 (D. Mass. 1926).

[7] This distinction also applies to the other cases relied upon by plaintiff. *HMH Pub. Co.* v. *Garrett*, 151 F. Supp. 903 (N.D. Ind. 1957); *New Am. Library of World Literature, Inc.* v. *Allen*, 114 F. Supp. 823 (N.D. Ohio 1953); *American Mercury*, *supra* n.5; *Bantam Books, Inc.* v. *Melko*, 25 N.J. Super. 292, 96 A. 2d 47 (Ch. 1953), *mod.*, 14 N.J. 524, 103 A. 2d 256 (1954).

Appendix B.

OPINION OF THE DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

September 12, 1969

WYZANSKI, Chief Judge

Plaintiff, a motion picture exhibitor, relying on the First and Fourteenth Amendments to the United States Constitution and 28 U.S.C. Sections 1331 and 1443 and 42 U.S.C. Section 1983, filed a complaint seeking to enjoin a Massachusetts state district attorney, his assistant, and an officer of the Massachusetts state police, from making threats to arrest (Sic!) and prosecute plaintiff if it continued to exhibit a motion picture, "Vixen."

By agreement of counsel, this case was heard as though it were an application for a permanent injunction and as though defendants had filed a motion to dismiss.

By agreement of counsel, the picture itself was introduced as an exhibit and was witnessed by the Court. It has a skimpy plot about the amorous adventures of an adulterous wife of an airplane pilot. Scenes prominently feature facial expressions and movements of female torsos during heterosexual intercourse and during lesbian contacts. Genitalia are never displayed either in repose or in action.

Plaintiff conceded that the only statements or threats made by defendants were directed exclusively to the general manager of plaintiff corporation. Plaintiff had no evidence that defendants or any of them had made with respect to the motion picture *Vixen*, (or apparently other pictures which plaintiff had considered exhibiting) any public statements orally, in writing, in print, or otherwise, or any private statements to third persons not employed by plaintiff.

Under these circumstances plaintiff does not have a cause of action in this Court.

If plaintiff wishes to exhibit *Vixen* defendants have not as yet legally interfered with the exhibition. Plaintiff has a completely unfettered legal right to proceed subject to whatever are the consequences. Its liberty, like that of most persons, depends in large part upon what Royer Collard called "the courage to resist" or Von Ihring denominated "the struggle for law."

On occasion, equity has restrained public officials from making *public* threats of prosecution of persons who offered allegedly obscene materials when those threats were not accompanied by, or immediately followed by, actual steps to commence or effectuate prosecution. Cf. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *HMH Publishing Co.* v. *Garrett*, 131 F. Supp. 903 (N.D. Ind. 1957); *New American Library of World Literature* v. *Allen*, 114 F. Supp. 823 (N.D. Ohio, 1953); *American Mercury, Inc.* v. *Chase*, 13 F. 2d 224 (D. Mass. 1923).

Basic to those cases was the attempt of the public officials to exercise the equivalent of a *public* ban or censorship without legal authority so to do. A private warning, no matter how minatory, is quite another story. Public officials have a right, some might say even an obligation of courtesy or decency, to warn one who proposes to exhibit, sell, display, or put into circulation material which the officials regard as obscene and in that sense unlawful. The warning may recite the explicit consequences foreseen.

The person warned requires no more than a firm determination on his own part to make the warning non-coercive. He may stand on his rights and bow to no man. Third persons since they know nothing of the threat, cannot be

deferred from giving him their custom. No inevitable adverse economic effect can be felt by the person threatened before he is prosecuted.

The chancellor ought not to use the powers of an equity court merely to stiffen a plaintiff's own spine. The difficulty here is with the plaintiff's constitution. No other constitutional issue is presented.

Complaint dismissed.

Charles E. Wyzanski, Jr., Chief Judge